STATE OF MICHIGAN

COURT OF APPEALS

SHANTI PICCALO,

Plaintiff-Appellant,

V

GILLIAN NIX,

Defendant-Appellee.

FOR PUBLICATION

May 15, 2001

9:10 a.m.

No. 212752

Oakland Circuit Court

LC No. 96-527301-NI

Updated Copy

July 20, 2001

Before: Zahra, P.J., and Hood and McDonald, JJ.

HOOD, J.

Plaintiff appeals as of right, following a jury trial, from a judgment of no cause of action. We reverse and remand for a new trial.

On July 4, 1996, defendant hosted a party at her residence. Defendant purchased a keg of beer[1] and food for the event. The event was attended by defendant's son and his friends, including members of the son's band. The majority of the individuals who attended the party, including plaintiff, were under twenty-one years of age. Defendant testified that she and members of the band told individuals attending the party that the beer was for individuals who were of legal drinking age. In addition to alcohol on the premises, various witnesses testified that they brought marijuana and "magic mushrooms" to the party for their own personal use.[2] The location of defendant's home provided limited parking space, so numerous individuals parked across the street at a senior citizen apartment complex. The police received a complaint from residents of the complex about a disturbance. The police found men, including Michael Burnham, by his van in the parking lot of the senior complex. There were two cups and a bottle of beer in the van, as well as drug paraphernalia. The men had an "X" on their hands. They indicated that they had been drinking at defendant's residence, and the "X" on their hands indicated that they had paid $5 for beer.[3] Police officers opined that Burnham was intoxicated. They allegedly walked the men back to defendant's residence and spoke to her regarding the condition of the men. Defendant allegedly told police that she would ensure that intoxicated individuals were driven home by designated drivers or stayed at the residence. The keys to Burnham's van were allegedly given to defendant. Some witnesses testified that, after the visit from the police, defendant lectured party attendees regarding their conduct and collected keys to vehicles. Additionally, defendant and other witnesses testified that the keg was "untapped" after the visit by the police. Defendant testified that the "tap" was hidden in the garage to preclude further drinking. Other witnesses testified that beer continued to be drawn from the keg until it was empty.

The testimony surrounding Burnham's departure from the party also varied. Defendant testified that she was assured that Burnham was not driving home, but was being driven home by

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[1] Defendant and her son testified that the keg was a quarter barrel of beer, while other witnesses testified that the keg was a half barrel of beer.

[2] The witnesses' testimony regarding defendant's knowledge of the substance and alcohol use varied. Defendant claimed that she did not see underage individuals consuming alcohol and that soda pop was available for those individuals. Additionally, defendant claimed that marijuana use did not occur in her presence, and she did not smell marijuana. Other witnesses concurred that marijuana use did not occur in defendant's presence. However, plaintiff and Jennifer Cassavoy testified that defendant was aware of drug and alcohol use by minors that occurred openly in the home.

[3] Defendant testified that the $5 was not charged for beer, but was to cover the costs of the extensive amount of food purchased for the party and for the band.

another individual. Defendant had trouble identifying the various individuals who had attended the party and who agreed to ensure Burnham's safe return home. Other witnesses alleged that defendant turned the lights on and off and told everyone to leave the home, in such a manner that staying overnight at the residence was not an option. Another witness testified that defendant implored Burnham to stay the night at her home, but Burnham essentially "fooled" defendant into believing that he was capable of driving. Nonetheless, Burnham got into his cargo van with five other individuals, including plaintiff. There were only two seats in the van, one for the driver and one for the front seat passenger. The remaining area of the van was open and contained tires and tools. The four passengers, including plaintiff, lay or sat in the back while Burnham drove them home. Unfortunately, the front seat passenger was obnoxious. There was frequent yelling and manipulation of the radio between the front seat passenger and Burnham. The back seat passengers yelled at Burnham to calm down and slow down because the van was traveling at a high rate of speed. Burnham failed to negotiate a slight curve in a gravel road and drove the van into a tree. Plaintiff was injured by the tires that were in the vehicle. When the police arrived on the scene, they found mushrooms near the van. Later testing of the mushrooms revealed that they had not been chemically altered, but were plain, ordinary mushrooms. The occupants of the van, for some unknown reason, hid the tires away from the scene of the accident. The police were never able to determine why the tires were moved.

Before the commencement of trial, plaintiff's counsel sought to exclude evidence of plaintiff's drug and alcohol use before the day of the accident. Additionally, plaintiff sought to exclude allegations that police officers were negligent in failing to arrest Burnham following their determination that he was intoxicated and in possession of drug paraphernalia in his van. The trial court did not exclude evidence of plaintiff's prior use, but did conclude that defendant would not be allowed to argue the negligence of police. Also, just before trial, plaintiff wished to add an allegation that defendant committed negligence for violating a local city ordinance. The trial court granted plaintiff's request, but refused to allow defendant to introduce her acquittal of a citation. Following an acrimonious trial, the jury concluded that defendant was nineteen percent negligent, Burnham was twenty-eight percent negligent, and plaintiff was fifty-three percent negligent, thereby precluding recovery.

On appeal, plaintiff raises various claims of error as grounds for a new trial. We conclude that the cumulative effect of errors requires reversal and remand for a new trial. *Haynes v Seiler*, 16 Mich App 98, 103; 167 NW2d 819 (1969) ("Although one of several incidents or errors, standing alone, may be disregarded as harmless error, it is still possible that when considered *in toto* they accumulate such a cumulative prejudice that they may require a reversal.").

Plaintiff argues that the trial court erred in applying and instructing the jury regarding the impairment defense. We agree. MCL 600.2955a provides, in relevant part:

> (1) It is an absolute defense in an action for the death of an individual or for injury to a person or property that the individual upon whose death or injury the action is based had an impaired ability to function due to the influence of

> intoxicating liquor or a controlled substance, and as a result of that impaired ability, the individual was 50% or more the cause of the accident or event that resulted in the death or injury. If the individual described in this subsection was less than 50% the cause of the accident or event, an award of damages shall be reduced by that percentage.

Issues of statutory construction present questions of law and receive review de novo. *Oakland Co Bd of Co Rd Comm'rs v Michigan Property & Casualty Guaranty Ass'n*, 456 Mich 590, 610; 575 NW2d 751 (1998). The primary goal of statutory interpretation is to give effect to the intent of the Legislature. *In re MCI Telecommunications Complaint*, 460 Mich 396, 411; 596 NW2d 164 (1999). This determination is accomplished by reviewing the plain language of the statute itself. *Id*. If the statutory language is unambiguous, it is presumed that the Legislature intended the clearly expressed meaning, and judicial construction is neither required nor permitted. *DiBenedetto v West Shore Hosp*, 461 Mich 394, 402; 605 NW2d 300 (2000). Only when the statutory language is ambiguous may we look outside the statute to ascertain the Legislature's intent. *Id*. We may depart from a strict literal interpretation of a statute that is inconsistent with the purposes and policies underlying the provision and would lead to absurd and unjust results. *Albright v Portage*, 188 Mich App 342, 350, n 7; 470 NW2d 657 (1991).

In the present case, the alleged negligence committed by defendant was the violation of state and local law in providing alcohol to minors.[4] Specifically, plaintiff presented evidence, if deemed credible, that defendant made alcohol accessible to minors, knew that minors were consuming the alcohol, learned through the police of the impairment of an underage drinker, Burnham, and failed to take adequate measures to prevent further inebriation. Accordingly, defendant seeks to benefit from the impairment defense when the alleged negligence was providing the means of impairment to underage minors. While the statute itself provides that the defense of impairment is "absolute" and applies "in an action for the death of an individual or for injury to a person or property," we decline to apply the statute in this personal injury action where defendant allegedly created the condition of impairment of both driver Burnham and plaintiff as well as other party attendees. It would be absurd to allow the defense of impairment to an

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[4] Admittedly, plaintiff, being over the age of eighteen, can be characterized as an adult. However, for purposes of consumption of alcoholic liquor, the Legislature has determined that she is underage and cannot be furnished alcohol. At the time pertinent to this action and before its repeal by 1998 PA 58, MCL 436.33(1) provided: "Alcoholic liquor shall not be sold or furnished to a person unless the person has attained 21 years of age." MCL 436.1701, enacted with 1998 PA 58, provides: Alcoholic liquor shall not be sold or furnished to a minor. MCL 436.1109(3) defines minor as "a person less than 21 years of age." Any modification to the age of majority in the context of alcoholic liquor should be directed to the Legislature.

individual who caused or created the impairment of the injured person. *Albright, supra*. Accordingly, defendant's contention that the statute applies in the present case is without merit.[5]

Plaintiff also argues that the trial court erred in failing to strike the testimony defense counsel elicited from the plaintiff regarding her percentage of fault. We agree.[6] A jury determines the outcome of a case, and a witness is not permitted to tell the jury how to decide the case. *Carson, Fischer, Potts & Hyman v Hyman*, 220 Mich App 116, 122-123; 559 NW2d 54 (1996). '"A witness is prohibited from opining on the issue of a party's negligence or nonnegligence, capacity or noncapacity to execute a will or deed, simple versus gross negligence, the criminal responsibility of an accused, or [the accused's] guilt or innocence.'" *Id*. at 123 quoting *People v Drossart*, 99 Mich App 66, 79-80; 297 NW2d 863 (1980). It is error to allow the witness to give the witness' own opinion or interpretation of the facts because the opinion testimony invades the province of the jury. *Carson, supra* at 123. Case law provides that the inquiry by defense counsel is prohibited. A witness is not to interpret the facts and determine contributory negligence because such opinion testimony invades the province of the jury. *Carson, supra*.[7] Accordingly, the trial court's admission of this testimony was improper.

Plaintiff also argues that the trial court erred in failing to cure the violation of plaintiff's substantial rights when defense counsel improperly referred to a fee agreement between plaintiff

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[5] The parties dispute whether the statute applies on the basis of the Legislature's failure to define the terms "cause" and "event" within the statute. Specifically, plaintiff argues that she did not suffer an impairment that "caused" the accident or event, and plaintiff's decision to accept a ride from Burnham is an "act" as opposed to an "event." Defendant contends that plaintiff's decision to accept a ride constitutes an "event" that caused her injuries. In light of our disposition of this issue, we need not address the parties' exercise in semantics.

[6] MRE 103(a)(1) provides that a party opposing the admission of evidence must timely object at trial and specify the same ground for objection that is asserted on appeal. See also *In re Weiss*, 224 Mich App 37, 39; 568 NW2d 336 (1997). To be timely, an objection should be interposed between the question and answer. *Id*. In the present case, plaintiff's counsel did not provide an evidentiary basis for the objection, but stated that defense counsel knew that the comment was inappropriate. The trial court did not request an evidentiary basis to support the objection, but instructed defense counsel to rephrase the question. Plaintiff then estimated her fault at fifty percent. Accordingly, plaintiff did not comply with the strict rules regarding preservation. When an issue is not preserved for appellate review, we determine whether manifest injustice will result from our failure to review the issue. *Winters v Dalton*, 207 Mich App 76, 79; 523 NW2d 636 (1994). The determination of what constitutes manifest injustice is contingent on the circumstances peculiar to each individual case. *Van Pembrook v Zero Mfg Co*, 146 Mich App 87, 94; 380 NW2d 60 (1985). In the present case, we conclude on the basis of [the cumulative error present in this case] that manifest injustice would occur if we did not review the issue.

[7] Indeed, when the inquiry was reversed, defense counsel objected to this type of inquiry. When plaintiff's counsel asked defendant whether she was negligent, an objection was raised.

and her counsel and improperly elicited testimony from police officers that had been excluded by the trial court. We conclude that the outcome of this issue, coupled with other errors regarding fault and statutory application, warrant a new trial. "When reviewing asserted improper comments by an attorney, we first determine whether the attorney's action was error and, if it was, whether the error requires reversal." *Kubisz v Cadillac Gage Textron, Inc*, 236 Mich App 629, 638; 601 NW2d 160 (1999). Unless the attorney's comments indicate a deliberate course of conduct designed to prevent a fair and impartial trial, there is no cause for reversal. *Id*. Reversal is required where prejudicial statements are made that reflect a studied attempt to inflame the jury or deflect the jury's attention from the issues involved. *Id*. In the present case, there was no evidence introduced regarding any fee agreement between plaintiff and her counsel. Despite the lack of an evidentiary basis, defense counsel noted that plaintiff requested in excess of $2 million in damages with one-third of that amount to plaintiff 's counsel. On appeal, defendant concedes that the argument was improper and fails to offer any proper purpose for referencing the fee before the jury.[8] While we cannot conclude that the statement was a studied attempt to inflame the jury, arguably it was elicited to detract the jury from the issues of fault and negligence. Furthermore, defense counsel was on notice, before trial, that the negligence of police officers was not an issue at trial. Despite the prior notice that such testimony was not admissible, defense counsel elicited from the police testimony regarding whether Burnham could have or should have been arrested following police contact at the senior citizen complex. Plaintiff 's counsel objected to the introduction of the evidence. The trial court merely overruled the objection without commenting on any reversal of the prior ruling or whether the questioning was somehow outside the bounds of the prior ruling. The testimony elicited by defense counsel was outside the scope of the initial ruling. It appears that the testimony was introduced to deflect the jury's attention from the issue at hand, that being any liability of defendant. Accordingly, defense counsel's improper conduct and introduction of evidence outside the scope of the trial court's ruling served to deflect the jury's attention from the issues at hand and warrants a new trial in light of the totality of errors in the case.[9]

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[8] Additionally, defense counsel asked Cassavoy about her own attorney and, in response to her answer, commented that it was not a "White House intern" situation. Such commentary is ill advised, unnecessary, and merely serves to deflect the jury's attention from the issues at hand.

[9] We note that plaintiff raises other issues of alleged evidentiary error. We have concluded that a new trial is warranted and the presiding judge over the initial trial has since retired. A circuit judge is required to follow published decisions from the Court of Appeals and the Supreme Court. *People v Hunt*, 171 Mich App 174, 180; 429 NW2d 824 (1988). There is no similar requirement that one circuit judge follow the decision of the other. *Id*. Accordingly, on remand the presiding judge is free to examine unresolved evidentiary issues anew. For example, on appeal, plaintiff contends that her prior drug and alcohol use is irrelevant and inadmissible. Plaintiff argues that the evidence was admitted to place her in a bad light. While it appears on its face that any prior drug or alcohol use has no relevance to the issue of defendant's negligence on the date in question, plaintiff, nonetheless, elicited extensive testimony from other witnesses regarding their own prior drug use. Plaintiff cannot use the same rules of evidence as both a

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Reversed and remanded for a new trial. We do not retain jurisdiction.

McDonald, J., concurred

/s/ Harold Hood
/s/ Gary R. McDonald

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shield and a sword. Plaintiff also alleges that testimony regarding her boyfriend's financial wherewithal was improperly admitted. However, this testimony was elicited after plaintiff's counsel, on direct examination, introduced evidence regarding plaintiff's live-in companion and ownership of her own home. Plaintiff's counsel cannot introduce evidence then exclude cross-examination on topics introduced by plaintiff. Additionally, while the trial court held that the negligence of police was not relevant to this trial, it then allowed, for some unknown reason, defense counsel to question police regarding their options and actions. After its initial ruling regarding exclusion of police negligence, the trial court allowed plaintiff's counsel to amend the allegations to include violation of a local ordinance as a claim of negligence. We cannot conclude from the record if this additional theory was the basis for allowing admission of the officer's testimony. Rather than address these issues in a vacuum without knowing the rationale underlying the trial court's decision, we remand these issues to the trial court, which is in a better position to address the remaining evidentiary issues anew.